

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the Matter of the Petition of)	
LEVEL 3 COMMUNICATIONS, LLC for)	
Arbitration Pursuant to Section 252(b) of the)	Case No. U-12460
Federal Telecommunications Act of 1996 to)	
Establish an Interconnection Agreement with)	
Ameritech Michigan.)	
_____)	

DECISION OF ARBITRATION PANEL

I.

HISTORY OF PROCEEDINGS

On June 9, 2000, Level 3 Communications LLC (Level 3) filed a Petition for Arbitration (Petition) with the Michigan Public Service Commission (Commission). The Petition seeks arbitration of an interconnection agreement with Michigan Bell Telephone Company, d/b/a Ameritech Michigan (Ameritech) pursuant to Section 252(b) of the Federal Telecommunications Act of 1996 (FTA) and in accordance with the procedure adopted by the Commission in its July 16, 1996 Order in MPSC Case No. U-11134. Level 3's Petition set forth thirty-seven (37) issues, not including subparts.

An Arbitration Panel (Panel) was designated consisting of Administrative Law Judge Daniel E. Nickerson, Jr. and Commission Staff members Robin Ancona and Dan Kearney.

On June 30, 2000, Ameritech filed its response to the Petition. Ameritech's response did not raise any additional issues.

On July 6, 2000, the Panel held a prehearing conference. Level 3 was represented by attorney Michael R. Romano. Ameritech was represented by attorney Michael G. Vartanian. A schedule was set. The Panel directed the parties to continue negotiations toward the resolution of as many issues as possible and further directed that the parties file a joint resolved and unresolved issues list.

On August 22, 2000, per the Panel's directive, the parties made oral presentations to the Panel on arbitration Issue 1 (Reciprocal Compensation); Issue 2 (Foreign Exchange Service Deployment of NXX codes); Issue 18 (UNE Combinations); Issue 19 (Enhanced Extended Loops); Issue 20 (Local Loop Definition); Issue 22 (Dedicated Transport); Issue 27 (Point of Interconnection); and Issue 33 (Trunk Utilization).

On September 8, 2000, each party filed a Proposed Decision of the Arbitration Panel (PDAP).

II.

RESOLVED AND UNRESOLVED ISSUES

Of the original 37 issues submitted for resolution in this arbitration, only sixteen (16) remain pending and unresolved. The parties have also negotiated several remaining issues to the point that only limited sub-issues remain pending and unresolved. Thus, in accordance with the requirements of the Commission's Order in MPSC Case No. U-11134, the Panel will consider and decide each of the remaining issues, which are:

Issue 1A	Reciprocal Compensation for ISP calls
Issue 2	FX Service - Deployment of NXX Codes
Issue 5	Charges for CLEC Name Changes
Issue 6	Term of the Agreement
Issue 7	Deposits, Billing and Payments
Issue 10	Third Party Intellectual Property Rights
Issue 14	Assignment
Issue 18	Combinations of Unbundled Network Elements Generally
Issue 19	Enhanced Extended Loops
Issue 20	Local Loop Definition
Issue 22	Dedicated Transport
Issue 25	Diversity
Issue 27	Points of Interconnection
Issue 31	Forecasting
Issue 33	Trunk Utilization
Issue 34	Indemnity

III.

PROPOSED FINDINGS AND CONCLUSIONS

The decisions of the Panel set forth in this document are limited by the specific standards for arbitration in Section 252 (b)(4)(A) of the FTA. The Panel's resolution of unresolved issues and any imposition of conditions upon the parties is subject to the requirements of Section 251 of the FTA and the Federal Communication Commission's (FCC) implementing regulations. As this Commission ordered in MPSC Case No. U-11134, the Panel's decision on each issue is limited to selecting the position of one of the parties on that issue, unless the result would be clearly unreasonable or contrary to the public interest.

Section 252(b) of the FTA provides that either party to a negotiation of an

interconnection agreement may petition the Commission to arbitrate unresolved issues in the negotiation. As stated above, Level 3 and Ameritech were unable to resolve certain issues by negotiation. Level 3 petitioned to arbitrate the unresolved issues in accordance with Section 252(b) of the FTA.

The parties were given proper notice of this proceeding. As required by the FTA, and as determined by the Commission, in MPSC Case No. U-11134, the Commission has jurisdiction to arbitrate and resolve the unresolved issues between the parties. The Panel after due consideration finds as follows:

ISSUE 1A: RECIPROCAL COMPENSATION FOR ISP TRAFFIC

Should the Parties compensate each other for delivering Internet traffic to each other's Internet Service Provider (ISP) customer?

DISCUSSION AND DECISION:

Level 3 argues that the Commission has already decided the issue of reciprocal compensation in prior Commission orders. While Ameritech agrees that the Commission has ruled that calls to ISPs are local calls, it contends that this decision is contrary to federal law. Ameritech further argues that ISP traffic is interstate and not subject to reciprocal compensation pursuant to Section 251(b)(5) of the FTA. Ameritech insists that the rate of any reciprocal compensation must be based on Level 3's costs. Ameritech professes that the issue before the Commission is whether some other, non-statutory, form of inter-carrier compensation should be imposed on ISP traffic and what that rate should be.

The Panel finds that the Commission has repeatedly addressed the issues raised above regarding reciprocal compensation for ISP traffic. The prior Commission decisions are well known to the parties and the Commission. One of the most recent Commission decisions states:

“The Commission therefore concludes as it has in the orders discussed above and for the reasons set out in those orders, that calls placed to an ISP within a customers’ local calling area are local calls for which the originating carrier owes reciprocal compensation to the terminating carrier pursuant to any applicable interconnection agreement or tariff...” MPSC Case No. U-12284, dated June 5, 2000.

The Panel sees no reason to deviate from the Commission’s prior clearly stated mandates on this issue. The Panel adopts Level 3's position.

ISSUE 2: DEPLOYMENT OF NXX CODES

Can Ameritech restrict the assignment of NXX codes in a certain rate center to be treated as local calls unless those end user customers actually maintain a physical presence in that rate center? NXX codes are the first three digits of a standard seven (7) digit telephone number.

DISCUSSION AND DECISION:

The parties’ disagreement on Issue #2 centers on whether or not Level 3 should be able to assign NXX codes to customers that are not located in the geographic area associated with that NXX code. Level 3 maintains that it needs the ability to assign NXX codes to customers that are not located in the geographic area associated with that NXX code and further states that such calls should be treated as “local” for reciprocal

compensation purposes.

Ameritech maintains that they should not have to be required to provide free interexchange transport and switching . Ameritech further states that Level 3 should not be able to charge reciprocal compensation on FX calls, which they consider identical to “virtual NXX service”, because such calls are not local exchange calls.

This issue was recently decided in MPSC Case No. U-12383 under the heading of Foreign Exchange (FX) Service. In this case, the Commission accepted the arbitration panel’s reasoning that Ameritech’s position should be rejected because the Commission has consistently found that intra-NXX calls are to be considered local for rating purposes, despite their actual routing. Specifically, in the Coast to Coast arbitration, the Commission concluded that virtual NXX or FX calls are “local” and rejected provisions in Ameritech’s proposed Appendix FX.

The Panel also notes that MPSC Case No. U-12528 which was commenced by the Commission’s July 17, 2000 order may, in its conclusions, affect the Commission’s position concerning the appropriate treatment and rating for FX and ISP calls.

ISSUE 5: CHARGES FOR CLEC NAME CHANGES

Issue #5 involves whether or not Ameritech should be permitted to include contract language that would allow it to collect unspecified charges from Competitive Local Exchange Carriers (CLECs) for processing CLEC name changes.

DISCUSSION AND DECISION:

The parties disagreement on Issue 5 is primarily one of cost recovery for such

things as CLEC name changes which can require the updating of accounts and programming changes. Level 3's position is that since these charges are incurred on an individual case basis and therefore cannot be specified in the contract, agreeing to these terms could result in open-ended charges being assessed on Level 3. Level 3 is also proposing that they be permitted to levy similar charges for the same type of changes made by Ameritech. Alternatively, Level 3 wants the Commission to require Ameritech to specify the total element long-run incremental cost (TELRIC) charges that would be incurred to make the necessary changes and also permit Level 3 to recoup these types of costs. Ameritech has proposed contract language that would allow it to negotiate with Level 3 a non-recurring charge to compensate Ameritech for costs for various items such as a corporate name change, transfer or assignment of interconnection trunks and/or facilities. Ameritech also contends that Level 3's request to be able to charge Ameritech for these types of costs is not appropriate because Ameritech does not purchase unbundled network elements (UNEs) or resale services from Level 3.

The Panel adopts the position of Level 3 with respect to the matter of CLEC name changes. Level 3 has correctly commented on the fact that Ameritech has failed to substantiate the need to recover these costs. Therefore, pending any future proceeding to the contrary, this Panel must assume that these costs are minimal and should be categorized as a normal cost of doing business and rejects both of the alternate Ameritech proposals offered in this proceeding. Similarly, the Panel rejects Level 3's suggestion that it be allowed to charge Ameritech for these types of costs.

ISSUE 6: TERM OF THE AGREEMENT

Should the term of the arbitration agreement expire in one year or three years?

DISCUSSION AND DECISION:

Level 3 contends that three years provides the necessary certainty for it to deploy its nationwide network regarding available interconnection methods, required points of interconnection, trunking and network architecture. Level 3 argues that without an agreement longer than one year, deployment of its nationwide network becomes inefficient, unreliable, and not meaningful for its purposes.

Ameritech urges the Panel to adopt a one year agreement to prevent the parties from being locked into terms that place them at a competitive disadvantage due to frequent changes in technology and regulations. Ameritech argues that a one year term will not generate any unnecessary transaction costs because the parties may simply renew their existing agreement where there is no market or technology driven needed changes.

The Panel finds that the term of the agreement should be three years. The Panel finds that a one year term is an inefficient use of resources of the parties and the Commission. The Panel would have adopted two years as a compromise. It appears as though a two year term was discussed by the parties, but was not offered as a position by either of the parties. Therefore, the Panel was left to decide between the two proposals. The Panel finds that a three year agreement is apropos to the circumstances. Level 3 needs the longer term agreement for business planning purposes. The Panel relies on Section 21 of the agreement which requires renegotiation in the event of material changes

in the law. The Panel finds that any major changes in technology requiring renegotiation is provided under the good faith provisions of the FTA.

ISSUE 7: DEPOSITS, BILLING AND PAYMENTS

Should Level 3 be required to comply with the Deposits, Billing and Payments provisions requested by Ameritech?

DISCUSSION AND DECISION:

Level 3 opposes the terms for deposits, billing and payments offered by Ameritech. Level 3 argues that it should not be required to pay an initial cash deposit as a condition prior to Ameritech providing resale services or UNEs. Level 3 argues that Ameritech has proposed criteria to rate a CLEC with “good credit history”. Level 3 argues that this proposed criteria is subject to substantial abuse. Level 3 argues that it poses no credit risk to Ameritech and that its financial strength provides sufficient protection from non-payment. Level 3 points out that protections for non-payment are covered by the Billing and Payment Charges provision of the Agreement.

Level 3 argues that if deposits are required, then there should be bilateral and equal deposits. Level 3 maintains that Ameritech should be required to likewise place deposits on its services such as reciprocal compensation.

Level 3 insists that it should not be required to provide written notice of billing disputes with a detailed explanation of the dispute prior to the bill due date as requested by Ameritech. Level 3 asserts that 60 days from the bill due date permits sufficient time for it to research and provide a detailed explanation of billing disputes. Level 3 maintains

that it would be willing to place funds in escrow within 30 days from the date of the notice of amounts in dispute. Level 3 asserts that it will perform all other payment terms under Sections 9.2 and 9.3 of the agreement.

Ameritech argues that it has written-off more than \$20 million in 1998 and 1999 as a result of numerous CLECs failing to meet their payment obligation. Ameritech asserts that it has sufficient basis to require deposits due to CLEC related bad debts and the fact that there have been over 30 CLEC bankruptcies filed over the past two years. Ameritech states that as of May 10, 2000, Level 3 owed Ameritech more than \$1 million with \$900,000 past due.

Ameritech rejects Level 3's proposed billing dispute notice requirement of sixty (60) days. Ameritech argues that Level 3 would effectively have ninety (90) days from the billing date to pay amounts owed.

The Panel adopts Level 3's proposal on the deposits, billing and payment terms as reasonable. The Panel finds that Level 3 and its affiliates, with \$8.6 billion of available assets, poses only a remote risk of defaulting on payments owed. Ameritech has available other protections contained in the General Terms and Conditions Section 8.1.5, 9.2 and 9.6 of the agreement which permit the assessment of interest on late payments and the ability to disconnect services. These provisions are not opposed by the parties and would reasonably protect Ameritech financially.

The Panel agrees with Level 3 that Ameritech's proposed "good credit history" rating is too subjective. The Panel finds that the potential for manipulation of delinquency

notices exists which could result in the application of subjective criteria in a rating system that should be objective.

The Panel sees no reason why the interest provisions for past due amounts should not apply likewise to Ameritech for late payments on reciprocal compensation or other payments due Level 3. Level 3 has shown cases where Ameritech has, in fact, been in arrears on reciprocal compensation payments by several months. The Panel finds that without imposing interest due on late payments by Ameritech, the agreement lacks fairness and has the potential for abuse.

The Panel finds that it is not practical to require Level 3 to assemble, analyze, fully document, and articulate the rationale for billing disputes prior to the bill due date. The Panel finds that the sixty (60) days proposed by Level 3 is satisfactory under the circumstances. The Panel recognizes that the vast majority of the billing amount is usually undisputed. Therefore, the financial burden of providing the sixty (60) days notice is not burdensome.

The Panel agrees with Level 3 and deletes the language in Section 9.5 which permits Ameritech certain rights including the right to terminate service if Level 3 does not pay within five (5) days of a demand for payment. The Panel views the interruption of customer service as serious and in some cases irreparable. The Panel finds that Section 9.5 imposes conditions which conflict with less onerous provisions of the agreement, i.e. billing, deposit and payment. Ameritech would have too much authority to impose onerous conditions on Level 3. The Panel finds sufficient authority for the termination of service

which adequately protects Ameritech financially without resort to Section 9.5 language.

ISSUE 10: THIRD PARTY INTELLECTUAL PROPERTY RIGHTS

Has Ameritech understated the extent of its obligations pursuant to the FCC memorandum regarding Third Party Intellectual Property Rights¹ (Third Party IP Order)?

DISCUSSION AND DECISION:

Level 3 contends that Ameritech seeks to minimize the extent to which it must use its 'best efforts' to provide all features and functionalities of each UNE it provides, including any associated third party rights. Level 3 charges that Ameritech seeks to shrink its responsibility to only those features and functions that Ameritech itself uses. Level 3 argues that the language of the Third Party IP Order is broader and requires Ameritech to obtain 'co-extensive' rights for the use of each UNE. Level 3 defines 'co-extensive' to mean "the same scope of rights that it (Ameritech) has obtained from the third party vendor and not merely the subset of rights that it actually uses." Pg. 34 Level 3's PDAP.

Level 3 asserts that Ameritech must bear the responsibility for claims of infringement. Level 3 argues that Ameritech is in the best position to identify the needed consents, authorizations, or licenses which third parties have provided to them. Level 3 argues that Ameritech bearing such responsibility produces the most efficient results at the least cost due to Ameritech's superior knowledge and better understanding to protect

¹ In the Matter of Petition of MCI for Declaratory Ruling that New Entrants Need Not Obtain Separate License or Right-to-use Agreements Before Purchasing Unbundled Elements, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 00-139 (rel. April 27, 2000).

against claims.

Level 3 argues that there is no needed additional indemnity provisions related to third party intellectual rights. Level 3 asserts that Ameritech has failed to show why the indemnity provisions found in the General Terms and Conditions provide inadequate protection.

Ameritech rejects Level 3's proposal as beyond the scope of the Third Party IP Order. Ameritech argues that it is the responsibility of Level 3 to obtain intellectual property rights when Level 3's use of Ameritech's network elements differs from Ameritech's use.

The Panel finds that Level 3's interpretation of the Third Party IP Order is more accurate with one exception. The Third Party IP Order specifically requires a CLEC to obtain intellectual property rights when it uses an element in a different manner. The Third Party IP Order states: "To the extent the requesting carrier intends to use the element in a different manner (e.g., in combination with some other element not contemplated by the incumbent LEC's particular license), the requesting carrier is solely responsible for obtaining this right from the vendor." ¶ 16, Third Party IP Order.

The Panel believes further elaboration on this point is warranted. The Third Party IP Order requires Ameritech to obtain third party intellectual rights that are "equal in quality to the terms and conditions under which the incumbent LEC has obtained these rights." ¶ 2, Third Party IP Order. Therefore, where Ameritech has a right to a functionality to which it is not currently using, then Level 3 is entitled to the intellectual property right of

the use of that functionality provided it is contemplated by the license to Ameritech. The Panel finds that under these circumstances, Level 3 is not required to duplicate the intellectual property rights in the license to Ameritech by again obtaining those same intellectual property rights from the vendor.

The Panel adopts Level 3's position regarding indemnity. The Panel finds sufficient protection exists in the General Terms and Conditions to fully protect Ameritech.

ISSUE 14: ASSIGNMENT

Should the parties be required to seek written approval prior to assigning or transferring the agreement? If so, should the notice requirement prior to assignment or transfer be thirty (30) days or ninety (90) days?

DISCUSSION AND DECISION:

Level 3 asserts that both parties should be required to seek prior written approval of assignments or transfers of the agreement. Level 3 proposes that such approval should not be unreasonably withheld. Level 3 proposes thirty (30) days advance notice. Level 3 also proposes that such requirements should not apply to assignments or transfers to affiliates. Level 3 argues that assignments or transfers are generally the result of a rapidly changing business climate. Level 3 asserts that prompt execution and consummation are essential to maintain the viability of the assignment or transfer. Level 3 maintains that while it views thirty (30) days as adequate, Ameritech has never explained why it should take ninety (90) days for approval.

Ameritech proposes a unilateral right to require ninety (90) days advance written

consent. Ameritech argues that it is not similarly situated with Level 3. Ameritech states that it has substantially more obligations and burdens under the FTA. Ameritech also argues that as a practical matter it generally engages in fewer assignments and transfers than CLECS.

The Panel sees no reason why the assignments and transfers provision should not apply equally to both Level 3 and Ameritech. The rationale for prior written approval is to provide some level of notice, protection, and analysis prior to the event. The Panel finds both parties equally entitled to the benefits of prior written approval. The Panel agrees with Level 3's assessment that such written approval should not be reasonably withheld.

The Panel adopts Level 3's proposal for thirty (30) days. The Panel finds that this period of time is adequate for review and analysis. However, the Panel also finds that the thirty (30) days should commence from the date on which the party seeking the assignment or transfer provides sufficient information to the other party of the financial, technical and managerial capabilities of the company to which the transfer or assignment is sought.

The Panel rejects Level 3's proposal that the assignment and transfer provisions should not apply equally to affiliates. Level 3 did not present sufficient basis for such an exemption.

ISSUE 18: COMBINATIONS OF UNBUNDLED NETWORK ELEMENTS GENERALLY

Should Ameritech be allowed to impose usage restrictions on Level 3's ability to combine UNEs with other services that do not comport with current law?

DISCUSSION AND DECISION:

Level 3 seeks to strike the following language from the Appendix UNE to Ameritech's proposed agreement:

“2.9.8 Unbundled Network Elements may not be connected to or combined with [Ameritech Michigan's] access services or other [Ameritech Michigan] tariffed service offerings with the exception of tariffed Collocation services where available.”

Level 3's position is that the contract already includes language that covers this situation and that this additional language goes too far and it would amount to a prohibition which is not allowed per the FCC's order. Level 3 makes reference to Section 251(c)(3) of the FTA which requires Incumbent Local Exchange Carriers (ILECs) to provide requesting carriers access to UNEs “for the provision of a telecommunications service . . .” The FCC codified in rule 51.309(a) its view that the plain meaning of Section 251(c)(3) of the FTA does not permit usage restrictions such as those imposed by Ameritech in Section 2.9.8 of the General Terms. Specifically, the FCC concluded that an ILEC:

“shall not impose limitations, restrictions, or requirements on request for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting carrier intends.”

Ameritech contends that Section 2.9.8 should include the full language it proposes, which prohibits UNEs from being combined with Ameritech access services or other Ameritech tariffed services, other than tariffed collocation services. Ameritech's arguments concentrate on the premise that Level 3 is requesting that Ameritech combine UNEs with tariffed services for Level 3. Ameritech quotes the FCC:

“This option does not allow loop-transport combinations to be connected to the incumbent LEC’s tariffed services,” as such “co-mingling” of UNEs and services could “lead to the use of unbundled network elements by IXC’s solely or primarily to bypass special access services.”

Supplemental Order Clarification, CC Docket 96-98, FCC 00-183, at paras. 22, 28 (rel. June 2, 2000). Ameritech goes on to say that neither the FTA nor the FCC’s rules require incumbent LECs to combine UNEs and services for CLECs.

The Panel finds other provisions in this particular Appendix of the interconnection agreement that include language for the situation that Ameritech intends to cover here. In particular, Section 2.8 states that Ameritech will not connect to or combine UNEs with any non-251(c)(3) or other Ameritech service offerings. The Panel agrees with Level 3 in that the language upon which Ameritech bases its position is taken out of context. The FCC set forth its concerns cited above regarding CLECs connecting UNEs with tariffed services in a context specific to loop/transport combinations. In the FCC’s Supplemental Order Clarification, at ¶ 28, the FCC states that:

“we emphasize that the co-mingling determinations that we make in this order do not prejudice any final resolution on whether unbundled network elements may be combined with tariffed services.”

Accordingly, as the FCC has not specifically prohibited the combination of UNEs with tariffed services, the Panel will likewise not do so here. Therefore, the Panel finds that the position of Level 3 should be adopted and the contract language in Section 2.9.8 should be deleted.

ISSUE 19: ENHANCED EXTENDED LOOPS

Does Ameritech have an obligation under existing law to provide unbundled access to existing combinations of loops, transport and multiplexing, commonly referred to as enhanced extended loops (EELs), regardless of whether or not Ameritech is providing access to unbundled local switching in a specific market?

DISCUSSION AND DECISION:

The issue here encompasses several dimensions embodied in the enhanced extended loop (EEL) issue. First, Level 3 maintains that under existing law Ameritech has an obligation to provide unbundled access to existing combinations of loops, transport and multiplexing, commonly referred to as EELs, regardless of whether or not Ameritech is providing access to unbundled local switching in a specific market. Level 3 also states that Ameritech is seeking to impose unreasonable conditions regarding the amount of local exchange traffic that must be carried before Ameritech will permit Level 3 to utilize combinations of transport and loops. Ameritech's certification form is included in Exhibit C of the proposed interconnection agreement. Level 3 objects to the type of additional information that Ameritech is seeking to obtain through this certification form. Level 3 stated in the oral presentations that it does not oppose the FCC's definition or the FCC's auditing provision. Level 3 also opposes language imposing termination charges and assessment of nonrecurring charges when special access loop-transport combinations are converted to UNEs.

Ameritech's position is that it will provide loop/transport UNE combinations in the

manner required by the FCC's UNE Remand Order, Supplemental Order, and Supplemental Order Clarification. Ameritech states that among other things, loop/transport UNE combinations are available only where converted from an existing special access arrangement and only where the combination will be used to provide a significant amount of local exchange service to a particular end-user. Ameritech asserts that Level 3 must use Ameritech/SBC's certification form to ensure that the latter requirement is met. Further, Ameritech asserts that for purposes of such certifications, the service Level 3 provides to ISPs is not local exchange service.

Ameritech states that as to terminology, Level 3 uses the term "Enhanced Extended Loop," or EEL to refer to both a pre-existing combination of a local loop and dedicated transport that Level 3 previously used for special access service, and a newly created combination of a local loop and dedicated transport. Ameritech refers to the former as a "loop/transport UNE combination" and the latter only as an EEL. Ameritech states that the EEL is relevant only in the context of unbundled local switching (ULS) and the FCC "carve-out" that allows incumbent LECs not to provide ULS in certain areas if they offer the EEL as a substitute. The right of CLECs to convert special access arrangements to loop/transport UNE combinations is an entirely separate issue.

Ameritech's proposed contract language would require it to give 60 days advance written notice if it ever decides to offer EELs in lieu of unbundled local switching in a specified area. That language also states that in such cases EELs will be provided at cost-based rates. Ameritech insists that this is consistent with the UNE Remand Order's

discussion of unbundled local switching.

As for the special access conversion issue, Ameritech states that Level 3's proposed contract language would require Ameritech to combine UNEs to affirmatively create new loop/transport combinations, i.e., EELs. At one time the FCC's rules required incumbents to affirmatively combine UNEs for CLECs but the Eighth Circuit, however, found that any such requirement violates the FTA and therefore vacated those rules, which have not been reinstated.

As to the issue of whether Ameritech is required to provide EELs to Level 3, the Panel would note that in the UNE Remand Order at ¶ 480, the FCC states that:

“we note that in specific circumstances, the incumbent is presently obligated to provide access to the EEL. In particular, the incumbent LECs may not separate loop and transport elements that are currently combined and purchased through the special access tariffs. Moreover, requesting carriers are entitled to obtain such existing loop-transport combinations at unbundled network element prices.”

The FCC goes on to say that:

“In particular, any requesting carrier that is collocated in a serving wire center is free to order loops and transport to that serving wire center as unbundled network elements because those elements meet the unbundling standard, as discussed above. Moreover, to the extent those unbundled network elements are already combined as a special access circuit, the incumbent may not separate them under rule 51.315(b), which was reinstated by the Supreme Court.”

The Panel would note that Ameritech through the collaborative process set forth by the Commission in MPSC Case No. U-12320 is in the process of addressing the EEL offerings and the corresponding costs/prices involved. Ameritech suggested that the

Panel defer further resolution of this issue to the docket MPSC Case No. U-12540, however, that docket does not include the EEL offering as an item in dispute. Instead, unresolved issues relating to EELs and other matters were raised for Commission resolution in filings made on September 25, 2000 in MPSC Case No. U-12320. In the meantime, this Commission recently issued an order in Ameritech cost docket, MPSC Case No. U-11831, in which it concluded that the cost for the UNE platform and EELs shall be the sum of the individual UNE elements. Through the collaborative, Ameritech has proposed an Amendment to its Interconnection Agreement for purposes of satisfying Section 271 of the FTA. This Amendment includes a section on the provision of EELs to CLECs. The Panel would note that this document has certain waiver provisions that must be agreed to before the CLEC can have access to the EEL under this agreement. Also, this Amendment will only be made available after this Commission issues an order approving this Amendment in Ameritech's 271² proceeding at some future uncertain date. Ameritech has proposed that new EEL combinations not be available as a tariffed offering and as such the Panel does not feel this is a reasonable solution to this issue.

The Panel finds that the contract should be revised to recognize that Ameritech is required to offer existing special access loop/transport service combinations at UNE prices where Level 3 can certify that the combination will be used to provide a significant amount of local exchange service to a particular end-user, as defined by the FCC in its Supplemental Order Clarification, CC Docket 96-98, FCC 00-183, rel. June 2, 2000.

²Ameritech's filing is pursuant to Section 271 of the FTA.

As to the certification issue, the Panel finds that the FCC's order (Supplemental Order Clarification, CC Docket 96-98, FCC 00-183, rel. June 2, 2000) at par. 29 states that:

"We do not believe that it is necessary to address the precise form that such a certification must take, but we agree with ALTS that a letter sent to the incumbent LEC by a requesting carrier is a practical method of certification. The letter should indicate under what local usage option the requesting carrier seeks to qualify."

The FCC order goes on to say that:

"in order to confirm reasonable compliance with the local usage requirements in this Order, we also find that incumbent LECs may conduct limited audits only to the extent reasonably necessary to determine a requesting carrier's compliance with the local usage options."

The FCC has clearly stated that a letter to the ILEC is a practical method of certification. The Panel finds that the additional and more detailed information requested in Ameritech's proposal is unnecessary. The Panel notes that this Commission considers ISP traffic as local and as such this Panel would also adhere to this Commission's prior determinations for the certification purposes. Therefore, the Panel finds that Exhibits B and C to the proposed interconnection agreement, SBC's Certification, should be rejected.

The parties also dispute whether Level 3 should pay any applicable termination charges for special access services that are converted to pre-existing loop/transport combinations and whether Level 3 should be required to pay the full non-recurring charges for each constituent network element in making use of the EEL. This requirement is authorized by the UNE Remand Order:

“We note, however, that any substitution of unbundled network elements for special access would require the requesting carrier to pay any appropriate termination penalties required under volume or term contracts.”

UNE Remand Order ¶ 486 n. 985. The Panel agrees that the FCC’s rule requires the requesting carrier to pay any appropriate termination penalties required under volume or term contracts, however, this Commission’s decision in MPSC Case No. U-11525, November 5, 1998, states that Ameritech may not impose the early termination penalty provisions for the sole reason that a customer desired to switch basic local service providers. The Commission stated, “if the contract must be terminated based on the customer’s choice of local exchange service providers, the penalty may not be imposed.”

As to the non-recurring charges, the Panel notes that the Commission order in MPSC Case No. U-11831 dated August 31, 2000, states that:

“the Commission concludes that whenever there is a migration, whether by resale, transfer to or between local exchange carriers, or any other manner, the migration cost determined in the prior order applies and that charge is the only nonrecurring charge for the migration.”

The Commission goes on to say that:

“neither is it appropriate, as Ameritech proposes, to add the nonrecurring charge for each UNE included in the platform. Instead, the nonrecurring charge for one individual UNE is appropriate for the newly installed UNE combination.”

The Panel would adopt the same reasoning in this instance and therefore adopts a position that does not allow for termination charges to be applied and the nonrecurring charges are to be applied consistent with the Commission’s order in MPSC Case No. U-

11831.

To further clarify, the Panel finds that Ameritech must offer EELs where they do not offer unbundled local switching per ¶ 278 of the FCC's UNE Remand Order. This Commission in MPSC Case No. U-11831 has ordered Ameritech to provide unbundled network element combinations and in its most recent order in MPSC Case No. U-11831 notes that as to the legal matters surrounding the EELs issue, there have been court decisions that may affect these issues. These other issues are left to be resolved in MPSC Case No. U-12320 and may include new EELs in general. A filing was initiated for this purpose on September 25, 2000. The Panel would defer resolution of the legal issues to this upcoming docket.

ISSUE 20: LOCAL LOOP DEFINITION

Should Ameritech provide written notice to Level 3 of the availability of higher capacity loop offerings, including but not limited to OC-192, within sixty (60) days of deploying such higher capacity loops in its network, unless Ameritech has tariffed the higher capacity loop offering within sixty (60) days of deploying such loops in its network?

DISCUSSION AND DECISION:

Ameritech states that it is already providing notice to all CLECs via its web site when it files its network disclosures which are required when a new type of loop is provisioned. Per the oral presentations, Ameritech indicates that this notification is provided six months prior to the new loop being available.

The FCC's UNE Remand Order at ¶ 165 states that:

“We conclude that LECs must provide access to unbundled loops, including high-capacity loops, nationwide. We find that requesting carriers are impaired without access to loops, and that loops include high-capacity lines, dark fiber, line conditioning, and certain inside wire.”

The Panel finds that since Ameritech is already required to provide this information via its web site, any further written notification is unnecessary. The Panel finds that Ameritech must include high-capacity loops in the definition and as such must provide the requisite notice to CLECs of the availability of those loops. The Panel believes that public notice via the web site is sufficient and thus finds for Ameritech on this issue.

ISSUE 22: DEDICATED TRANSPORT

Should Level 3 be permitted to request unbundled transport from an Ameritech central office to a third party's location where Level 3 maintains a presence? Should Ameritech be required to provide notice of the availability of higher capacity facilities within sixty (60) days of deploying such transport in its network, to the extent that Ameritech does not offer such facilities?

DISCUSSION AND DECISION:

Ameritech contends that Level 3 should only be permitted to request unbundled dedicated transport between the locations designated in FCC Rule 319(d)(1)(A). Ameritech states that it should not be required to provide notice of the availability of higher capacity facilities within sixty (60) days of deploying such transport in its network, other than the notice already provided via tariff offerings. FCC Rule 319 specifies the locations between which an incumbent LEC must provide unbundled dedicated transport:

“(1) Interoffice transmission facility network elements include:

(A) Dedicated transport, defined as incumbent LEC transmission facilities . . . dedicated to a particular customer or carrier, that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers. 47C.F.R. § 51.319(d)(1)(A).”

Ameritech’s position is that Level 3 seeks to require Ameritech to provide unbundled dedicated transport not only between wire centers or switches owned by Ameritech or Level 3 but also between “equipment locations” or “network components” owned by one of them, or to “network components” owned by other carriers or directly to customer premises. Ameritech contends that the FCC has never required unbundled dedicated transport to be provided to such locations and Level 3 provides no basis for suddenly extending Rule 319(d) to include such locations here. It is Ameritech’s position that if Level 3 has a switch at a third party location then unbundled dedicated transport is appropriate.

Level 3’s position is that Ameritech should provide unbundled access to dedicated transport between Level 3 designated locations including wire centers, switches, equipment locations, and network components owned by either Party, or other carrier network components, or to customer premises. Level 3 maintains that it should be allowed to use unbundled dedicated transport to carry traffic from its own collocation space in an Ameritech central office to another carrier’s office if transport already exists along that route. Level 3’s position is that the parties may not use dedicated transport to replace

access services except as provided by the FCC and as specifically set out in the Agreement. Further, Level 3 states that Ameritech should be required to provide Level 3 written notice of the availability of higher capacity dedicated transport offerings within sixty (60) days of when it deploys higher speed dedicated transport in its network, unless Ameritech has tariffed such higher capacity dedicated transport offering within sixty (60) days of deploying such transport in its network.

The Panel finds that the same notification process applies here as it does to the higher capacity local loop offerings. Since Ameritech states that it provides much earlier notice of these new offerings via its web site, it would satisfy the requirement of a sixty (60) day notice and, therefore, the Panel finds that a written notification to Level 3 would be unnecessary.

The FCC rules in this area go on to state in § 51.319(d)(2)(C) that:

“The incumbent LEC shall . . . Permit to the extent technically feasible, a requesting telecommunications carrier to connect such interoffice facilities to equipment designated by the requesting telecommunications carrier, including but not limited to, the requesting telecommunications carrier’s collocated facilities.”

Since this section considers a collocated equipment space of the requesting carrier an allowable instance where unbundled dedicated transport shall be provided, the Panel finds that Level 3's position is acceptable. The Panel finds on the issue of unbundled dedicated transport that Ameritech should be required to provide unbundled dedicated transport from an Ameritech central office to a third party’s location where Level 3 maintains a presence.

ISSUE 25: DIVERSITY

Is Ameritech required to provide physical diversity for unbundled dedicated transport at TELRIC rates that does not already exist on Ameritech's network without any cost recovery mechanism?

DISCUSSION AND DECISION:

The parties disagree on whether or not Ameritech is required to offer physically diverse routing where it does not currently exist without having a cost recovery mechanism in place. Level 3 is proposing that language included in the draft agreement covering the recovery of costs for creating diversity where it does not currently exist be deleted. The specific language is as follows:

“When additional costs are incurred by SBC-12STATE for CLEC specific diversity. SBC-12STATE will advise CLEC specific diversity. SBC-12STATE will not process the request for diversity until CLEC accepts such Charges. Any applicable performance measures will be abated from the time diversity is requested until CLEC accepts the additional charges.”

The Panel agrees with Level 3 that Ameritech's contract language should make clear that the charges imposed for physical diversity should be the applicable cost-based rates for Unbundled Dedicated Transport which is included in the pricing appendix. Therefore, additional diversity should also be available at cost-based rates developed in accordance with the FTA. Level 3 should not be required to pay a different rate for physical diversity on an individual case basis.

ISSUE 27: POINT OF INTERCONNECTION

Should Level 3 be permitted to establish a single point of interconnection (POI) in each local access and transport area (LATA) in which Level 3 provides local exchange service?

DISCUSSION AND DECISION:

Level 3 seeks initially to establish a single point of interconnection in each LATA in which Level 3 provides local exchange service. Level 3's position is that each carrier should be responsible for providing facilities and trunking to the POI for the hand off of local and toll traffic, and each carrier should be responsible for completing calls to all end users on its network. Ameritech's position is that Level 3 should establish multiple points of interconnection, one at each tandem in a LATA in which Level 3 provides local exchange service. Level 3's position is that under Section 251(c)(2)(B) of the FTA, Ameritech must provide interconnection at any technically feasible point within its network selected by Level 3.

Section 251(c)(2) of the FTA gives competing carriers the right to deliver traffic terminating on an incumbent LEC's network at any technically feasible point on that network, rather than obligating such carriers to transport traffic to less convenient or efficient interconnection points. Section 251(c)(2) of the FTA lowers barriers to competitive entry for carriers that have not deployed ubiquitous networks by permitting them to select the points in an incumbent LEC's network at which they wish to deliver traffic. (Local Competition Order at ¶ 209)

Level 3 agrees that as traffic volumes increase, sound engineering principles may

dictate that Level 3 add new points of interconnection at other Ameritech switches. However, those traffic volumes do not yet exist, and there is no reason, or legal basis, for the Commission to compel initial interconnection in each local exchange area or at each tandem.

Ameritech maintains that Level 3 should establish POIs at each tandem when a LATA is large enough to have multiple tandems. Ameritech states that Level 3's position ignores the fact that calls within a single LATA may be local or toll. If Level 3 is allowed to establish a single POI per LATA, it can easily avoid transport charges. Ameritech goes on to say that when a CLEC such as Level 3 chooses to have one switch serve a large area, there will be a savings in switching costs but an increase in transport charges. Ameritech also goes on to say that Level 3's position would create serious network architecture problems.

The FCC's order at ¶ 212 states that:

"we also note that the points of access to unbundled elements discussed below may also serve as points of interconnection (i.e., points in the network that may serve as places where potential competitors may wish to exchange traffic with the incumbent LEC other than for purposes of gaining access to unbundled elements), and thus we incorporate those points by reference here."

The Panel finds that the FCC's orders and Section 251(c)(2)(B) of the FTA govern the requirement that Ameritech must provide interconnection at any technically feasible point within its network selected by Level 3. The FCC's order does not require multiple points of interconnection. The Panel finds that Level 3 should be permitted to establish

a single point of interconnection in each LATA in which Level 3 provides local exchange service. The Panel notes that the two parties have been interconnected under a previous agreement and have been able to mutually work out any changes to the network as traffic volume's increased. Level 3 has noted its desire to continue this process in the future which would address any anticipated architecture problems as they arise. The Panel finds this a reasonable process to use in future network expansions.

ISSUE 31: FORECASTING

The remaining dispute between the Parties as represented by Level 3 with regard to Issue #31 centers on Level 3's proposed language in sections 6.3 and 6.6 of appendix ITR that would require Ameritech to notify Level 3 of tandem exhaust situations and any network expansions, software and hardware upgrades, or other network changes that would preclude Ameritech from completing Level 3's orders as scheduled.

DISCUSSION AND DECISION:

Although Ameritech did not address Issue #31 in its PDAP, the Panel does not find any compelling arguments, cited case precedent, or documented evidence that supports Level 3's position to require the language proposed in sections 6.3 and 6.6 related to notification requirements.

ISSUE 33: TRUNK UTILIZATION

Should Ameritech build additional trunks when utilization rates reach 50% or 75%?

DISCUSSION AND DECISION:

Level 3 proposes the ordering of additional trunks when the utilization rate reaches 50%. Ameritech proposes a 75% trunk utilization rate prior to building new trunks.

The Panel finds in favor of Ameritech. Ameritech presents compelling arguments that the general interest of the CLEC community would be best served by not having underutilized trunks which would result in increased costs and potentially stranded capacity.

ISSUE 34: INDEMNITY

Should indemnity provisions proposed by Ameritech in Appendix Operations Support Systems (OSS) Resale & UNE be adopted?

DISCUSSION AND DECISION:

Level 3 argues that the indemnity provisions proposed by Ameritech are unreasonably broad and should be rejected. Level 3 argues that the indemnity provisions in the General Terms and other sections of the Agreement adequately protect Ameritech from any reasonably foreseeable loss. Level 3 declares that it will not agree to an open-ended provision which requires it to pay unspecified charges associated with inaccurate ordering or usage for the OSS. Level 3 further declares that it cannot agree to conform to hardware and software interface requirement and standards which have not even been developed or promulgated by Ameritech.

Ameritech argues that as a general principle the party that causes a loss should bear the responsibility for the loss. Ameritech argues that these provisions simply make it clear that Level 3 and not Ameritech is liable for any OSS related losses caused by Level

3's employees or the use of equipment under the control of Level 3. Ameritech argues that the language it proposes is consistent with this principle.

The Panel adopts the language proposed by Ameritech, with one exception, Ameritech constantly upgrades and modernizes its equipment. Ameritech has not shown that it is in the position to determine, in advance, what those upgrades and modernizations involve in technical terms. Ameritech should not incorporate in any upgrade or modernization obsolescence of Level 3's system. In other words, Ameritech upgrades must be performed in a manner that either provides sufficient advance notice to Level 3 of its need to update its system or must incorporate provisions for existing technology. The Panel views this as a logical extension of Ameritech's stated driving principle that the party causing a loss should bear the responsibility.

IV.

CONCLUSION

Therefore, for the reasons enumerated above, the Panel recommends that the Commission approve of the interconnection agreement as modified by the Decision of the Arbitration Panel.

THE ARBITRATION PANEL

Daniel E. Nickerson, Jr.

Dan Kearney

Robin Ancona

September 25, 2000
Lansing, Michigan
dp

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